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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. [redacted] 840

DOMINICK F. PADUANO, KATE F. WHEELAN, JUDITH WEINER and NICHOLAS G. DeJOY,

Petitioners,

against

CITY OF NEW YORK, ROBERT F. WAGNER, as Mayor of the City of New York, and ARMAND D'ANGELO, as Commissioner of the Department of Water Supply, Gas and Electricity of the City of New York,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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Petitioners,

against

CITY OF NEW YORK, ROBERT F. WAGNER, as Mayor of the City of New York, and ARMAND D'ANGELO, as Commissioner of the Department of Water Supply, Gas and Electricity of the City of New York,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioners pray that a writ of certiorari issue to review the final order of the Court of Appeals of the State of New York entered therein in the aforementioned case on September 22, 1966, and as amended by said Court by its order of October 18, 1966.

In the court of origin an order and a judgment [one paper] was initially entered in the office of the Clerk of the County of New York on March 10, 1965. An appeal therefrom was taken by petitioners to the Appellate Division of the Supreme Court, First Department; the intermediate court affirmed the order and judgment appealed

from, which order of affirmance was entered in the office of the Clerk of the Appellate Division on June 24, 1965. Judgment pursuant thereto was entered in the office of the Clerk of the County of New York on the same day.

On October 28, 1965 an order was made in the Court of Appeals of the State of New York granting petitioners leave to appeal to it. On June 9, 1966 the Court of Appeals affirmed the order and judgment appealed from. No opinion was rendered. On September 22, 1966 the Court of Appeals denied petitioners' motion for reargument; it granted their application to amend the remittitur. The Court requested the return of that paper from the Clerk of the County of New York and, when returned ordered that it be amended by adding thereto the following:

> "Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz.: Whether the rights of the plaintiffs-appellants under the Fifth, Ninth and Fourteenth Amendments were violated. The plaintiffs argued that fluoridation is discriminatory because it benefits children only, unlawfully imposes medication on patients against their will and is or may be dangerous to health and, for those reasons, the City program of fluoridation violates the equal protection and due process provisions of the Federal Constitution. The Court of Appeals considered this contention and held that since the fluoridation program does not constitute a significant invasion of fundamental rights there was no denial of the plaintiffs-appellants' constitutional rights." (18 N Y 2d 721)

On October 18, 1966 the Court of Appeals granted petitioners' application to resettle its order of September 22, 1966 and directed that the remittitur be "further amended to substitute the word 'people' for the word 'patients' appearing therein".

Citations to Opinions Below

As already noted, there was no opinion rendered by the Court of Appeals, except the statements contained in its orders, dated September 22, 1966 and October 18, 1966, respectively (18 N Y 2d 721). There was no opinion by the Appellate Division, its determination and order of affirmance stating that the affirmance was "on the opinion of Mr. Justice Brust at Special Term" (24 A D 2d 437 [6]).

There was an opinion rendered in the Supreme Court, New York County (45 Misc 2d 718).

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

Questions Presented

The Court of origin, whose views were adopted by the Appellate Division, and by the Court of Appeals, found that the Supreme Court of the United States has not yet decided:

1. Whether a State in the proper exercise of the police power can force individuals to take medication for non-contagious diseases or illnesses which are not debilitating to the individual concerned and which can be prevented by other readily available and inexpensive means. Hence this is a case of first impression which requires a definitive determination because of the novelty and importance of the issue and its effect upon millions of our inhabitants.

2. Unlike other cases dealing generally with the subject of fluoridation of the water supplies of a

municipality, no issue is raised or presented herein as to the claimed beneficial effects of fluoridation upon young children; rather, the issue is the preservation of the right of bodily privacy, which is a constitutionally protected right as important as any of the rights under the "First", "Fourth", "Fifth", "Sixth", "Ninth" and "Fourteenth" Amendments.

3. Whether, absent compelling need in the interest of a community as a whole and without a showing of a subordinating interest which is compelling, a Board of Health may require the insertion of a drug, chemical or medicine in the water supplies of the City of New York and thus compel its ingestion by all of the municipality's inhabitants.

4. Whether the claim by those in control of the affairs of a community, on the basis of medical or scientific advice, or otherwise, that the fluoridation program in question bears a reasonable relationship to securing the health of some members of the community, justifies the compulsory use or ingestion of a drug, chemical or medicine by all of its inhabitants.

5. Whether fluoridation of a municipality's water supplies, however well motivated, without the claim that it is designed to benefit all of the inhabitants of the community, violates basic constitutional rights, absent informed consent of the persons involved, and whether such a program, which is in the nature of a medical experiment, constitutes a significant invasion of fundamental constitutional rights.

6. Whether, where experts differ as to the possible or probable harmful physical effects upon adults (i.e., those suffering from or having a tendency to diabetes, kidney diseases, allergies, bone ailments and certain difficulties arising during pregnancy), a final judgment should have been rendered merely on affidavits, before

joinder of issue, or whether a trial should have been directed so that the opinions of the experts could be tested by examination and cross-examination. Was denial of a trial a violation of the equal protection and due process provisions of the Federal Constitution?

7. Whether the position for which respondents contended below is one which this Court approves, viz., "if medical science should discover a vaccine preventing cancer, the State [should not] be powerless to require the population to be vaccinated against that noncontagious disease."

The Record

The appeals to the Appellate Division and the Court of Appeals were prosecuted on the original record, i.e., the papers on file with the Clerk of the County of New York in this cause under Index No. 07400/1964.

For the convenience of the appellate courts those filed papers had been arranged in inverse, chronological order and in that order were consecutively numbered. The order and page number of each filed paper appears in the New York County Certificate which is affixed to the original order. References to page numbers in this brief are keyed to such continuing pagination.

All numerical references herein are to the consecutive page numbering of the record as they appear in the County Clerk's Certificate attached thereto, unless otherwise indicated.

On August 19, 1966 an order was made in Supreme Court, New York County, on the consent of the attorney for the respondents and the attorney for the County Clerk given in open court, authorizing and directing the County Clerk to forward to the Clerk of the Supreme Court of the United States the original record herein, consisting of all

the papers on file in the office of the Clerk of New York County under the index number aforementioned. Said order also provided that the respondents may send to the Clerk of this Court at least nine duplicate copies, in printed or photostated index form, of their affidavits and other papers used in Supreme Court, New York County on the respondents' motion to dismiss petitioners' complaint and in opposition to petitioners' cross-motion for a temporary injunction. All the foregoing papers are for use in this Court on petitioners' application for a writ of certiorari or other proceedings in the action, subject to the rules or order of this Court, and the papers so transmitted by the New York County Clerk are to be returned to said Clerk at the expense of petitioners.

Constitutional Provisions and Statutes Involved

Petitioners presented, and the courts below necessarily considered, questions under the Constitution of the United States, namely, whether the rights of the petitioners under the Constitution were violated. Petitioners argued that the fluoridation program is discriminatory because it unlawfully imposes medication on people against their will, is or may prove to be dangerous to health, and invades bodily privacy; for these reasons the equal protection and due process provisions of the Constitution are violated.

The courts below considered petitioners' contention and held in substance and effect, as petitioners construe those decisions, that although compulsory ingestion of a drug, chemical or medicine represents an invasion of fundamental rights, such invasion was not sufficiently "significant" to constitute a denial of constitutional rights.

It has long been the rule that no drug, medicine or chemical may be used on human beings unless the consent of the person required to use the drug has first been obtained. Moreover, the consent must be an informed one. The addition of fluoride to the water supplies is not de-

signed or intended to be for the purpose of maintaining or improving the quality of water or making it safe to use. It has not been suggested by any of the proponents of fluoridation that dental caries is a water-borne disease or that water is a cause of dental decay.

The only exception to this rule is that a chemical may be used in the water supplies for the destruction of bacteria or the prevention of disease when the life or health of the community as a whole is directly concerned. Absent such a situation, or informed consent in other circumstances, the right of the people to be secure in their persons "shall not be violated" (Fourth Amendment). To be compelled to ingest a drug or chemical without consent constitutes a deprivation of liberty without due process (Fifth Amendment). To deprive people of their right to refuse to take a drug, medicine or chemical with their water or food is a denial or disparagement of rights guaranteed by the Ninth Amendment. Not to require consent abridges the privileges or immunities of citizens; such lack of consent deprives persons of liberty without due process and also denies them the equal protection of the laws. Similar provisions are found in New York State Constitution, Article 1, § 1 and Article 1, § 11.

In short, one of the important constitutional questions presented is whether compulsory medication of any kind, however well intentioned and having no relationship to the community's life and health, violates fundamental rights. *Rochin* v. *California*, 342 U. S. 165 (1952); *Breithaupt* v. *Abram*, 352 U. S. 432 (1957); *Anderson* v. *Moses*, 185 F. Supp. 727 (1960); cf., 31 Federal Register No. 168, page 11415 (Aug. 30, 1966).

This Case is Unique

The Supreme Court of New York examined all of the cases which had been presented to this Court and decided by the courts of other states of the United States, as

well as in foreign countries, and then held:

> "* * * As far as this court can determine, the highest courts of our State and of the United States have not yet decided whether a State, in the proper exercise of the police power, can force individuals to take medication in these non-contagious diseases which are not extremely debilitating to the individual concerned and which can be prevented by other readily available and inexpensive means." (45 Misc 2d at 726)

In no case involving the subject of fluoridation was this Court asked to decide whether a state or municipality in the proper exercise of police power may require individuals, without their consent and absent an emergency which is directly related to the security of life and health in the City or State, to take a drug, chemical or medicine for those non-contagious ailments which are not debilitating to the individual concerned and which can be prevented by other readily AVAILABLE and inexpensive means.

The papers and briefs submitted by the parties, and particularly the medical and scientific opinions proffered by them, show that serious belief and conflict exists as to the deleterious effects of fluoridation upon adults, and particularly those persons who suffer from diabetes, kidney diseases, allergies, bone ailments and certain difficulties arising during pregnancy, e.g., Exhibits which are part of the original papers, pp. 477, 478, 479, 480, 481, 484, 485; affidavit of James B. Patrick, an organic chemist, research group leader in antibiotics at Lederle Laboratories, pp. 497-591; affidavit of A. W. Laubengayer, an inorganic chemist and Professor of Chemistry, Cornell University, pp. 592-601; affidavit of George Eugene Kosel, research chemist and former associate in chemistry with the Atomic Energy Commission and the United States Public Health Service, and presently engaged as a research chemist with the Philip A. Hunt Chemical Corporation, pp. 647-655; affi-

davit of Dr. Norton Sager Brown, former president of the New York County Medical Society, pp. 656-657; affidavit of Dr. A. Allen London, a practicing dentist and former president of the New Jersey section of the American Academy of Dental Medicine, and president of the Boonton, New Jersey, Board of Health, pp. 677-707; affidavit of Dr. Simon A. Beisler, former president of the American Urological Association and presently chief of the Urological Service at Roosevelt Hospital, pp. 708-722; Dental Digest, Vol. 60, pp. 170-172 [1954]; Cancer Research, Vol. 24, Part I, pp. 751-753 [1964]; Proceedings of the Society for Experimental Biology and Medicine, Vol. 117, pp. 686-689 [1964] and Vol. 119, pp. 252-255 [1965]; British Medical Journal, issue of October 26, 1963, p. 1064; International Archives of Allergy and Immunology, Vol. 7, pp. 70-74 [1955], Acta Medica Scandinavia, Vol. CLVI, pp. 157-168 [1956].*

The Supreme Court of New York held, and the two New York appellate courts agreed, that petitioners were required to bear the burden of proof of producing scientific evidence as to the harmful effects of fluoridation, and unless and until that burden could be discharged, the judicial branch of our government would not interfere with the determination of a municipality to subject all of its inhabitants to the ingestion of a drug, chemical or medicine. On this point, the court of origin wrote:

> "Until the scientific evidence as to the deleterious effects of fluoridation reaches beyond the purely speculative state now existing, decisional law mandates the holding that the controversy should remain within the realm of the legislative and executive branches of government." (45 Misc 2d at 728)

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* The articles in the six scientific publications were printed in the Appendix of the petitioners' [plaintiffs'] brief in the Court of Appeals at pages A1 through A49 thereof; a copy of that brief is among the original papers forwarded by the New York County Clerk to this Court.

While courts do not ordinarily undertake to substitute their judgments for those of administrative bodies, they must however decide whether the agency [the Board of Health] whose action is called into question has correctly discharged its duties.

In a recent case a public utility sought to construct a pumped storage hydroelectric project on the west side of the Hudson River at Storm King Mountain in Cornwall, New York. A conservationist organization asked the court to set aside orders of the Federal Power Commission which, in effect, permitted such construction. It was charged, among other things, that the Commission was required to compare the proposed project with any alternatives available and, if the utility had alternatives better adapted to development of the river for all beneficial uses, including scenic beauty, the application should have been denied. In that controversy it was contended that there must be assurance that the Commission would adequately protect public interest in aesthetic, conservational and recreational aspects of power development.

The court held that the objecting conservationist group and others were entitled to protect their special interests and unless it had been shown that the Commission had inquired into and considered all relevant facts as to alternative courses, the approval given to the utility's application should be set aside. *Scenic Hudson Preservation Conf.* v. *Federal Power Commission*, 354 F. 2d 608 at 620-22 (2d Cir. 1965).

In *Food Machinery & Chemical Corp.* v. *Meader*, 249 F. 2d 377, 379 (9th Cir. 1961), the court held:

> "Fluorine and fluorides are toxic, and it is recognized that a sufficient concentration can be harmful and may eventually result in death. * * *"

In the same case a number of experts gave conflicting evidence as to the effect of fluoridation in fish and fish eggs

and whether the injury and damage claimed was caused by the ingestion of fluorides. The Court noted that such varying expert testimony presented a triable issue and could only be resolved by a trial (249 F. 2d at 383).

The question which naturally and logically presents itself is whether bodily privacy is not as important as concern over fish and fish eggs, or aesthetic and recreational interests.

Statement of the Case

The Parties and Nature of the Action

Petitioners (plaintiffs below) are citizens, residents and taxpayers of the City of New York; one of them was formerly Commissioner of the Department of Water Supply, Gas and Electricity of that municipality.

This action was brought to declare the water fluoridation program of the City of New York to be unconstitutional and invalid in that, among other things, it violated the Fourteenth Amendment to the Federal Constitution, as well as other constitutional provisions. They sought an injunction.

Respondents (defendants below), without serving a responsive pleading, moved, on affidavits, to dismiss the complaint. The motion was treated as one for summary judgment under the New York Civil Practice Law and Rules 3211, subd. (a) 7 and subd. (c). The complaint was dismissed; the petitioners' cross-motion for a temporary injunction was denied. There was a long and interesting opinion by the Supreme Court, New York County (45 Misc 2d 718).

An appeal was taken by the petitioners to the Appellate Division, which affirmed on the opinion of Special Term (24 A D 2d 437[6]). Thereafter the Court of Appeals of the State of New York granted leave to appeal; however, the determinations in question were unanimously affirmed

on June 9, 1966, without opinion (17 N Y 2d 875). The remittitur was later twice amended, as already observed (18 N Y 2d 721).

The primary issue tendered by the complaint in Supreme Court, New York County, was the constitutionality and legality of the New York City fluoridation program which would necessarily require all inhabitants of New York City who depend upon the municipal water supplies for drinking, cooking and related purposes, to ingest a drug, chemical or medicine which would be placed in those water supplies. Petitioners asserted that the fluoridation program constituted an abridgement of a fundamental personal liberty, i.e., the right not to be compelled to take or ingest a drug, chemical, medicine or toxic substance when neither the safety nor the security of the community is involved.

Petitioners contended that no necessity was shown for the encroachment upon bodily integrity or physical privacy. Petitioners further alleged that the mere claim by the municipal authorities that there was some rational relationship to the effectuation of an asserted proper purpose was not enough where a significant invasion of a right of privacy occurs, for in such a situation, they urged, the promulgating agency is required to show a subordinating interest which is compelling.

Basically the complaint and petitioners' papers maintain that the constitutional right of an individual to be secure in his own bodily person is inviolate, absent an emergency which threatens the health and welfare of the community; such right of bodily privacy is within the ambit of the constitution and is entitled to constitutional protection. The right to be secure in one's physical person is as much entitled to protection under the Federal Constitution as are the civil rights which have been the subject of recent case law in this Court. Put another way, the right not to be compelled to take a drug, chemical or medicine should

have the same protection, petitioners contend, as the right to vote, the right to counsel, the right to prevent illegal search and seizure, the right not to be required to make an involuntary confession, the right to speak, assemble and publish freely, or the right to a fair trial. The rights just enumerated relate to mind and spirit as well as to literary and other property. But those rights and the constitutional amendments which proscribe invasion of those rights apply as well to violations of bodily privacy, physical integrity and protection against medical or scientific experiments upon a person without his informed consent.

Petitioners in tendering the constitutional issue argued that just as an individual, assuming his mental competency, may not without his knowledge, except in an extreme emergency, be subjected to surgery, so, too, he may not be required by a legislative body or an administrative agency to take a medicine, chemical or drug unless such ingestion is required in order to safeguard the life and health of the community.

Reasons for Granting the Writ

Summary of Argument

The decisions below are not in accord with the applicable decisions of this Court in that:

1. The Court of Appeals erred in holding, in effect, that the invasion of bodily privacy was not so "significant" an invasion of fundamental rights as to constitute a denial of constitutional rights.

2. The issue of the right not to be compelled to take a drug, chemical or medicine, absent an emergency situation which involves the life and health of the community, presents a substantial federal question.

3. The right of bodily privacy is as vital and as much entitled to protection as any of the other civil rights; it is as important as the right to a fair trial, the right not to incriminate oneself, the right to counsel, the right to assemble, speak and write freely, the right of privacy in one's home, the right to be secure in one's person, or the right to refuse to have one's name or picture used for certain purposes. It has long been held that the right of privacy, a natural, as well as a statutory and constitutional right, comprehends one's absolute dominion and control over his inviolate personality subject to very few and unusual exceptions not present here.

Argument

The Courts below found that this case presented a constitutional question in that petitioners had contended and argued that fluoridation is discriminatory because it benefits only a segment of the population of the City of New York and unlawfully imposes medication upon people against their will and is or may be dangerous to health, and for those reasons the City's fluoridation program violates constitutional rights.

The State courts considered this contention and held, as petitioners view the determinations by those tribunals, that the fluoridation program did indeed constitute an invasion of fundamental rights but that such intrusion upon bodily privacy does not represent a "significant" invasion of those rights; hence there was no denial of petitioners' constitutional rights.

1. The right of refusal to take a drug is a fundamental one; it may not be abridged simply on a claim that a regulatory rule or ordinance has some rational but limited relationship to the effectuation of a proper city or state

purpose. "Where there is a significant encroachment upon personal liberty [the City or] State may prevail only upon showing a subordinating interest which is compelling." *Bates* v. *Little Rock*, 361 U. S. 516, 524 (1960); see, *Schneider* v. *State* (*Town of Irvington*), 308 U. S. 147, 161 (1939). See, also, *"Fluoridation—Is It Constitutional? No"*, Fordham Law Review, Vol. XXIV, number 4, page 657, *et seq.* [1955-56], and *"Freedom of Religion and the Water Supply"*, Southern California Law Review, Volume 32, number 2, page 158 [1959].

Although the fluoridation program, which compels all of the users of the municipal water supplies to ingest a drug, chemical or medicine, obviously encroaches upon a fundamental personal right or liberty, there is no showing that the New York City Health Code (§ 141.08, effective April 7, 1964), by which fluoridation was prescribed, serves any "subordinating interest which is compelling" or that it is "necessary . . . to the accomplishment of a permissible state [or city] policy".

Respondents contended in the courts below that there is some rational relationship between fluoridation and its claim to be a legitimate subject of Board of Health concern—the reduction of dental caries in young children. The rationalization of this justification is dubious, particularly, as the court of origin observed, in the light of the admitted widespread availability of "other readily available and inexpensive means" of supplying children with fluorine (45 Misc 2d 718, at 726).

2. Since the means for achieving the avowed purpose of aiding children are readily at hand, they should be resorted to without the need to invade the area of protected freedoms and privacies. The decision to use the water supplies is an "easy" way out, but such easy road is not to be followed if it leads down unconstitutional paths. See, *McLaughlin* v. *Florida*, 379 U. S. 194, 196

(1964); *Scenic Hudson Preservation Conf.* v. *Federal Power Comm. and Con. Ed. Co. of N. Y., Inc.*, 354 F. 2d at 620-22; cf., *Griswold* v. *Connecticut*, 381 U. S. 479 (1965); see, e.g., affidavit of Dominick F. Paduano (¶ 11 [1], p. 18, and exhibits thereto attached, pp. 487, 489, 491, 492).

The right not to be compelled to take a drug or a medicine except in the setting of an emergency where the health of a community is directly involved, threatened or affected, is fundamental. The defendants cannot constitutionally abridge this basic right, which is protected by the Fourteenth Amendment to the Federal Constitution and the New York State Constitution, Article 1 § 1 and § 11. It is also a right retained "by the people" within the meaning of the Ninth Amendment. Moreover, the invasion of an individual's physical being and privacy by requiring him to ingest a drug or medicine with his drinking water violates the Fourth and Fifth Amendments. *Boyd* v. *United States*, 116 U. S. 616, 630 (1886); see *Beaney, "The Constitutional Right to Privacy"*, Sup. Ct. Rev. 212 (1962); *Griswold, "The Right To Be Let Alone"*, 55 Nw. U. L. Rev. 216 (1960).

There are a number of cases which, as was said by Mr. Justice Douglas, in *Griswold*, at 485:

> ". . . bear witness that the right of privacy which presses for recognition . . . is a legitimate one."

See, e.g., *Breard* v. *Alexandria*, 341 U. S. 622, 626, 644 (1951); *Public Utilities Commission* v. *Pollak*, 343 U. S. 451 (1952); *Monroe* v. *Pape*, 365 U. S. 167 (1961); *Lanza* v. *New York*, 370 U. S. 139 (1962); *Frank* v. *Maryland*, 359 U. S. 360 (1959); *Skinner* v. *Oklahoma*, 316 U. S. 535, 541 (1942).

The Due Process Clause protects those liberties that are "so rooted in the traditions and conscience of our people

as to be ranked as fundamental." *Snyder* v. *Massachusetts*, 291 U. S. 97, 105 (1934).

In *Olmstead* v. *United States*, 277 U. S. 438, 478 (1928), Mr. Justice Brandeis [in his dissenting opinion] summarized the principles under the Federal Constitution's guarantees of privacy:

> "[The makers of our Constitution] . . . recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure, and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred as against the Government the right to be let alone—the most comprehensive of rights and the right most valued by civilized men."

In *Pointer* v. *Texas*, 380 U. S. 400, 413, 414 (1965), Mr. Justice Goldberg expressed the view that the court should determine in each instance whether a practice, statute or regulation is sufficiently repugnant to the notion of due process as to be forbidden the states.

In *Jacobson* v. *Massachusetts*, 197 U. S. 11 (1905), this Court wrote, at 29:

> "There is, of course, a sphere within which the individual may assert the supremacy of his own will and rightfully dispute the authority of any human government, especially of any free government existing under a written constitution, to intefere with the exercise of that will."

However, the Court also stated, at 29:

> "But it is equally true that in every well-ordered society, charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, under the pressure of

great dangers, be subjected to such restraint to be enforced by reasonable regulations, as the safety of the general public may demand."

We are mindful of an extension of the *Jacobson* principle permitting a municipality to anticipate danger due to infectious or contagious disease or to ensure and protect "security of life and health." Under this enlargement, such programs as compulsory vaccination for school children in advance of the outbreak of an epidemic have been sustained. The ultimate expansion of *Jacobson* was reached in *Buck* v. *Bell,* 274 U. S. 200 (1927), where this Court upheld the right of the public health officials of the State of Virginia to sterilize a mental defective. The breadth of *Jacobson* is evident, but the frame of reference was inheritable disease.

> "We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the state for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes . . . Three generations of imbeciles are enough." (274 U. S. 200, at 207)

Even this example of the extreme application of *Jacobson* is founded upon the concept of protection of the populace from a communicable disease. Nowhere does it appear that the court intended by its decision to foist on the citizenry compulsory medication for its own sake.

Thereafter, a retreat is evident and it may fairly be said that a new judicial attitude has evolved. An illustration of

this recession is provided by *Skinner* v. *Oklahoma*, 316 U. S. 535 (1942). There, the court held unconstitutional a statute permitting sterilization of persons convicted three times of certain felonies involving moral turpitude. The majority opinion (Douglas, J.) regarded the statute as a violation of the equal protection clause. The concurring opinions of Justices Stone and Jackson asserted that the due process clause was also breached (at 543-4).

Griswold clearly points the way: future cases involving invasions of physical integrity and privacy will we believe be treated in a fashion consistent with *Skinner* and *Griswold*. Those latter cases indicate the modern trend of this Court to place limits on the exercise by a state or a municipality of its authority under the guise of "police power". Surely, fluoridation represents an invasion of physical integrity without the justification of "conserving the safety" or the "security of life and health" of the community. The insertion of a drug into the water supply is not the same as the granting of a license to sell milk or to regulate in areas in which there is authority to act.

The defendants engage in unwarranted speculation when they assert that this Court's dismissal of several fluoridation cases without fully hearing them or its refusal to grant certiorari is a determination or *sub silentio* comment on the merits. The overburdened docket of the Supreme Court does not permit it to exercise unlimited appellate jurisdiction and a great deal depends on how this tribunal views the State Court's resolution of the controversy underlying the particular case.

In the proceedings in this Court in memory of Mr. Justice Frankfurter, 382 U. S. XV, the Solicitor General observed at page XXII [quoting from Professor Alexander Bickel's "Felix Frankfurter: A Tribute"]

> " 'The very nature of the Court's position in the scheme of American government called upon it to be wisely selective in the choice and restrained in the number of cases it heard and decided. He had no patience

with charges that in denying review the Court was, as the press put it,, "ducking the issue." The Court was not a knight-errant sworn to search out and right wrongs and slay dragons of precedent. It was far better to leave a decision unreviewed than for the Supreme Court to decide it wrongly or prematurely. He believed that the issues the Court chose to review should be ripe for decision and needed time for collective deliberation and decision, and for careful and persuasive exposition of the decision so necessary for its acceptance by the country. Congress had responded most generously to the Court's request for power to control and limit its own docket; to use the power effectively required, so he thought, stern selectivity.' "

The history of the American Revolution which distinguishes it from the French is a lesson for our times; liberation from oppression is only the first phase of revolution and is of no value unless it is followed, as Tocqueville wrote, by the second phase, the establishment of a foundation of individual freedom through constitutional guarantees. Or, put another way—there is no freedom or justice without limits on governmental authority. Those necessary limitations or restraints must be retained or strengthened in the light of proliferating prerogatives of scientific and technical élites and governmental endorsement and enforcement of them.

Good causes have been the traditional excuses for doing violence to the rights of individuals. When the flame of science began to burn some three hundred years ago, the danger to be perceived and now perhaps to be realized is the divination of science and the displacement of other values, spiritual and personal, by the scientists.

3. This Court has been vigilant in the protection of the rights of defendants even in extreme situations following conviction of murder, rape and other serious felonies. Its

concern has been to guarantee a fair trial, to prevent improper self-incrimination, to prevent unlawful search and seizure, illustrated by *Mallory* v. *United States*, 354 U. S. 449 (1957); *Mapp* v. *Ohio*, 367 U. S. 643 (1961); *Ker* v. *California*, 374 U. S. 23 (1961); *Monroe* v. *Pape*, 365 U. S. 167 (1961); *Gideon* v. *Wainwright*, 372 U. S. 335 (1963); *Escobedo* v. *Illinois*, 378 U. S. 478 (1964); *Massiah* v. *United States*, 377 U. S. 201 (1964); *Malloy* v. *Hogan*, 378 U. S. 1 (1964); *Miranda* v. *Arizona*, 384 U. S. 436 (1966).

More recently in *Schmerber* v. *California*, 384 U. S. 757 (1966) this Court permitted involuntary blood tests so as to determine whether the driver of a vehicle was drunk. The tenor of Mr. Justice Brennan's majority opinion indicates the trend to limit invasions of bodily privacy and integrity to a special state of facts and circumstances not present in the instant case, and this is particularly so in light of *Griswold*.

Some states have Civil Rights laws which provide that the right of an individual to be secure in his person may not be violated (e.g., N. Y. Civil Rights Law, § 8). Other provisions of that statute inhibit the use of the name, portrait or picture of any living person for commercial purposes without having first obtained his written consent, and make violation thereof a misdemeanor (id. § 50).

Is the right of privacy as to the use of a name, portrait or picture of a person entitled to more protection than the right of bodily privacy?

Is it more important to provide an accused with counsel than to protect a citizen who is not charged with a breach of any statute from being compelled to take a drug, medicine or chemical against his will?

Is it more important to guarantee a fair trial to a defendant convicted of murder than to see to it that a law-abiding citizen's right to bodily integrity is preserved?

One may not be compelled, except in an unusual setting, to testify against himself. But may he be required to drink municipal water supplies that contain a drug, chemical or medicine which may prove to be toxic to him?

4. This is a proper case for intervention by the nation's highest tribunal. It is not one for the application of the abstention doctrine; the issue of bodily privacy and invasion of one's physical well being would seem to require resolution by this Court. *Cf., Harman* v. *Forssenius,* 380 U. S. 528 (1964). Just as the elimination of the poll tax was made this Court's concern, so, too, the prevention of invasion of bodily privacy would appear to call upon this Court to declare such action either to be improper, as we contend, or constitutionally permissible, as the respondents maintain. Such declaration would end the national controversy over fluoridation, especially as it relates to and involves those directly affected by it but for whom fluoridation is not actually directed or prescribed and for whom it may well prove dangerous.

The issues in the form in which they are tendered by petitioners are bound to arise again in the same or in a substantially similar manner. They call for final resolution. The right to bodily privacy should be brought into line with the other rights which this Court has declared the Constitution protects.

5. In the courts below the respondents contended that a state or a municipality could require vaccination against non-contagious diseases, a doctrine not sanctioned by any case decided by this Court. Under the heading "*Fallacies in plaintiffs'* [*Petitioners'*] *contentions of unconstitutionality*", in one of their briefs, respondents stated their position thusly:

> "If plaintiffs were right in their contention that the state may use immunizing requirements only to combat

contagious diseases, then if medical science should discover a vaccine preventing cancer, the State would be powerless to require the population to be vaccinated against that non-contagious disease." (p. 30. Respts.' Br. in the Appellate Division).

Here, baldly set forth is the case for a wholly homogenized society in which there are to be no rational or reasonable limits to the exercise of authority under the "police power" by those in control of the affairs of a community. In that argument, the defendants fail to perceive the obvious difference between providing medical care or medication, and compelling its use.

The logical extension of respondents' concept and understanding of the proper use of "police power" in "health" situations would permit a Board of Health to require the use of drugs, medicines or chemicals to control population growth, eliminate the desire for alcohol, or the smoking of cigarettes, to mention only three "evils" to which municipal or other authorities might under the authority of this case address themselves.

CONCLUSION

For the foregoing reasons, we urge that this petition for a writ of certiorari be granted.

Respectfully submitted,

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